BINGHAM

Andrew D. Lipman
Russell M. Blau
Philip J. Macres
andrew.lipman@bingham.com
russell.blau@bingham.com
philip.macres@bingham.com

November 1, 2007

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Ex Parte*, Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, WC Docket No. 06-172

Dear Secretary Dortch:

On October 3, 2007, the undersigned submitted an *ex parte* letter rebutting, among other things, Verizon's claim that its past conduct in offering "commercial" terms to CLECs for facilities that are no longer available as Unbundled Network Elements allows the Commission to infer that it would offer "reasonable" post-forbearance terms for access to unbundled loops.[1] We pointed out that Verizon adamantly refuses to disclose what those terms would be (even under the protection of the Protective Orders in this docket), which alone should lead the Commission to doubt whether they would be commercially reasonable.

Since that letter was submitted, additional information bearing on Verizon's "commercial agreement" practices has come to light. On October 12, 2007, AT&T Communications of Virginia, LLC ("AT&T") submitted a Petition to the Virginia State Corporation Commission for approval to increase its residential local telephone service rates in Virginia.[2] In its Petition, AT&T asserts that a $2.00 monthly rate increase is necessary due to increases in AT&T's costs, *resulting from the terms of its commercial agreement with Verizon for UNE-P replacement services.* Specifically, AT&T attributes its cost increase to the results of this Commission's *Triennial Review Order*, which caused AT&T's parent to enter "into a commercial agreement with Verizon whereby [AT&T] would continue serving its existing UNE-P customers, but only by paying higher market-based wholesale rates." (Petition at 3-4.) AT&T states that it increased its monthly residential local service rate to these existing customers by $2.00 effective

[1] Letter from Andrew D. Lipman *et al*. to Marlene H. Dortch, Secretary, FCC WC Docket No. 06-172 (October 3, 2007).

[2] *Petition of AT&T Communications of Virginia, LLC for Approval to Exceed Price Ceilings*, PUC-2007-00090 (Va. SCC filed Oct 12, 2007) (copy attached hereto as Exhibit 1).

Boston
Hartford
Hong Kong
London
Los Angeles
New York
Orange County
San Francisco
Santa Monica
Silicon Valley
Tokyo
Walnut Creek
Washington

Bingham McCutchen LLP
2020 K Street NW
Washington, DC
20006-1806

T 202.373.6000
F 202.373.6001
bingham.com

March 1, 2007, and proposes an additional $2.00 increase effective February 1, 2008. Although the terms of AT&T's commercial agreement are proprietary and not disclosed in the public version of the Petition, AT&T does state that the "aggregate $4.00 price increase is *well short* of the [proprietary] increased costs AT&T has incurred" under its agreement with Verizon. (Petition at 4, emphasis added.) As a result of these increased costs, AT&T asserts that it is unable to continue serving Virginia residential customers unless it is permitted to charge *more* for local service than Verizon does.

A market price is not a just and reasonable price if the market is dominated by a monopolist, and AT&T's experience suggests that that is exactly what is happening in Virginia. Due to the elimination of Verizon's UNE-P obligations, AT&T was forced to pay "market-based" wholesale prices dictated to it by Verizon, because there was no other way for AT&T to continue serving its existing Virginia customers. According to AT&T's Petition, AT&T now cannot even offer a competitive price to those customers—it must charge more than Verizon does, for the same retail service, just to cover the costs imposed on it under the commercial agreement. And if AT&T, which is likely the largest single purchaser of Verizon's Wholesale Advantage product, cannot effectively compete while buying wholesale inputs from Verizon on commercial terms, how can any other company be expected to do so?

Thus, contrary to Verizon's argument in its September 12, 2007, ex parte letter,[3] the fact that Verizon has entered into 150 or more "commercial" agreements for UNE-P and other wholesale services does not imply that those agreements are just and reasonable, or that the public interest would be protected by forcing CLECs to acquire unbundled loops under similarly "negotiated" terms. Rather, it only proves that 150 carriers had no choice but to take whatever terms Verizon was willing to offer them, and that Verizon is willing to use its monopoly power, in the form of a classic price squeeze, to drive competitors out of the market. Verizon cannot even show that all of the 150 carriers that executed these commercial agreements are operational today and actively marketing to retail customers. While there may be some, these commercial agreements are, by and large, like tombstones – evidence that life once existed but not that it exists today.

In previous submissions, we have noted that Verizon could demonstrate the reasonableness of its proposed commercial terms for loops by disclosing what they will be, but Verizon has chosen to withhold this information from the Commission. In our July 10, 2007, submission, we estimated that Verizon's commercial terms could result in recurring charge increases of $8.75 per month <u>or more</u>, and nonrecurring charge increases of up to $300.00 per line, either (or both) of which would make it uneconomical to offer competitive voice or broadband service over unbundled loops.[4] If these estimates were inaccurate, Verizon easily could have corrected them, but it has remained silent.

---

[3] Letter from Dee May, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172, at 3 & 4 (filed Sep. 12, 2007).

[4] Letter from Andrew D. Lipman, *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172 (filed July 10, 2007).

As the Commission has not hesitated to ask parties in this docket for information that might be relevant to determining the potential impacts of forbearance, it should ask Verizon to submit its proposed commercial terms for access to unbundled loops, before reaching any conclusion about whether those terms are likely to be reasonable.

If Verizon continues to insist on concealing its intent from the Commission, the only rational inference is that forbearance would result in Verizon using its market power to engineer a price squeeze, driving competitors using unbundled loops out of local exchange markets.

Sincerely,

/s/ Russell M. Blau

Andrew D. Lipman
Russell M. Blau
Philip J. Macres

Attorneys for

Alpheus Communications, L.P.;
ATX Communications, Inc.;
Cavalier Telephone Corporation;
CloseCall America, Inc.;
DSLnet Communications, LLC;
Eureka Telecom, Inc. d/b/a
InfoHighway Communications;
ITC^DeltaCom Communications, Inc.;
McLeodUSA Telecommunications
Services, Inc.;
MegaPath, Inc
Mpower Communications Corp.;
Norlight Telecommunications, Inc.;
Penn Telecom, Inc.;
RCN Telecom Services, Inc.;
RNK Inc.;
segTEL, Inc.;
Talk America Holdings, Inc.;
TDS Metrocom, LLC; and
U.S. TelePacific Corp. d/b/a
TelePacific Communications

cc: Scott Bergmann (all via E-mail and hand delivery)
Scott Deutchman
Ian Dillner
John Hunter
Chris Moore
Dana Shaffer
Nick Alexander
Marcus Maher

EXHIBIT 1

at&t
Mark A. Keffer
General Attorney &
Associate General Counsel
3033 Chain Bridge Road
3rd Floor
Oakton, VA 22185
T: 703.691.6046
F: 832.213.0131
mkeffer@att.com

October 12, 2007

2007 OCT 12 A 9:51

Joel H. Peck, Clerk
Document Control Center
State Corporation Commission
1300 East Main Street
Richmond, VA 23219

Re: **Petition of AT&T Communications of Virginia, LLC**
<u>for Approval to Exceed Price Ceilings</u>

Dear Mr. Peck,

PUC-2007-00090

Enclosed for filing with the Commission are an original and fifteen (15) copies of the Petition of AT&T Communications of Virginia, LLC for Approval to Exceed Price Ceilings pursuant to 20VAC5-417-50.D.

A copy of the proprietary version is being provided in a sealed envelope. The proprietary version is also being provided to Mr. Irby and Ms. Cummings of the Telecommunications Division.

Please return one stamped copy in the enclosed self-addressed, postage-paid envelope.

Thank you for your attention to this matter.

Sincerely,

Mark A. Keffer

Enclosures

CC: William Irby
Kathleen Cummings

BEFORE THE
VIRGINIA STATE CORPORATION COMMISSION

Petition of AT&T Communications of Virginia, LLC for Approval to Exceed Price Ceilings	Case No.

PETITION OF
AT&T OF COMMUNICATIONS OF VIRGINIA, LLC

AT&T Communications of Virginia, LLC ("AT&T") hereby respectfully petitions the Commission pursuant to 20VAC5-417-50.D for authority to establish effective February 1, 2008, residential local exchange prices for AT&T's Call Plan Unlimited Plus that will exceed comparable Verizon's prices by $2.45 per month.[1] The Commission's rules, at 20VAC5-417-50.D,[2] specifically provide that, absent approval from the Commission, a CLEC's prices cannot exceed those of the relevant incumbent local exchange carrier. All AT&T customers affected by this Petition reside within a geographic area for which Verizon is the incumbent.[3] As explained herein, AT&T makes

---

1 AT&T will file the requisite tariff pages on or about December 19, 2007, with a February 1, 2008, effective date. At the same time, AT&T also will seek permission to close enrollment for Call Plan Unlimited Plus as of February 1, 2008. Existing Call Plan Unlimited Plus customers will not be permitted to move or modify their Call Plan Unlimited Plus service on or after that date. That filing will provide information required by 20 VAC 5-423-50.

2 Rule 20VAC5-417-50 has been modified effective October 9. 2007, by *Final Order* in Case No. PUC-2007-00033, September 27, 2007.

3 AT&T is providing at least 30 days notice to each of its Call Plan Unlimited Plus customers with a bill message indicating "AT&T is seeking Virginia State Corporation Commission authority to increase the price for your initial line to $18.82, and for additional lines to $17.95, effective February 1, 2008. AT&T also is seeking permission to close enrollment for Call Plan Unlimited Plus as of February 1, 2008. Existing Call Plan Unlimited

this request as a result of an explicit, readily quantifiable, and exogenous increase in its costs. The public interest will not be harmed by the granting of AT&T's Petition, because every customer affected by the price increase has multiple other service options available to them. Customers dissatisfied with AT&T's prices or service can easily switch to another carrier. In support of this Petition, AT&T provides as follows:

(1) The Commission's rules, at 20VAC5-417-50 D, provide in relevant part that

> Unless otherwise allowed by the commission, prices for basic telephone service and associated service charges, not purchased as part of a bundled service, shall not exceed the highest of the comparable tariffed or applicable ceiling rates, as determined by the commission, of an incumbent local exchange carrier or carriers in the service territory.

The same rule, at subparagraph G,[4] instructs that --

> A new entrant may petition the commission for approval of pricing structures or rates that do not conform with the price ceiling requirements in subsections D and E. The new entrant shall provide appropriate documentation and rationale to support any request. The commission may permit such alternative pricing structures if the public interest will be not harmed.

(2) AT&T proposes to increase its statewide price for its Call Plan Unlimited Plus by $2.00 per line per month. The monthly price for the primary line would increase from $16.82 to $18.82. The price for additional lines would increase from $15.95 to $17.95.

Plus customers will not be permitted to move or modify their Call Plan Unlimited Plus service on or after that date. Please call 1-800-288-2747 with any questions."

4 This subparagraph was also modified by the Commission's September 27, 2007 *Final Order* in Case No. PUC-2007-00033.

(3) Verizon's rate for its most directly comparable flat rate local exchange service is $16.37 per month.[5] Thus, AT&T's proposed increase would result in a price that, for most customers, is $2.45 cents per line higher than Verizon's price for the primary line and $1.58 per line higher that Verizon's price for additional lines.

(4) AT&T's costs for serving its remaining Virginia residential basic local exchange customers have increased subsequent to a series of court and FCC decisions. As the Commission is aware, in March 2004, the D.C. Circuit Court of Appeals vacated the FCC's rule making UNE-P available.[6] Accordingly, in July 2004, AT&T Corp. announced it would cease actively marketing traditional wireline local and long distance services to residential customers.[7] AT&T Corp. indicated that it would continue to serve its existing wireline residential customers, but only so long as it could do so economically.[8] Shortly after the AT&T Corp. announcement, the FCC released its *Triennial Review Order* which, among other things, required all carriers to transition off of UNE-P by March 11, 2006, or make other arrangements to serve customers.[9] In September 2005, AT&T Corp. entered into a commercial agreement with Verizon

---

[5] Verizon's service is priced according to eight rate groups, ranging from $10.80 in the least densely populated rate group to $16.37 in the most densely populated group. AT&T's customers, however, are predominantly located in the most densely populated Verizon rate areas. That is because at the time AT&T was actively marketing UNE-P based service to Virginia residential customers, Verizon's charges for the unbundled loop were lowest in the most densely populated areas, thus giving AT&T and other CLECs an incentive to concentrate marketing efforts in those areas.

[6] *USTA v. FCC*, 359 F3d 554 (D.C. Cir. 2004)

[7] July 22, 2004, AT&T Press Release "AT&T Announces Second-Quarter 2004 Earnings, Company to Stop Investing in Traditional Consumer Services; Concentrate Efforts on Business Markets"

[8] *Id.*

[9] Federal Communications Commission, *Re: Unbundled Access to Network Elements*, WC Docket No. 04-313; *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, August 20, 2004.

whereby AT&T Corp., through its various affiliates, including AT&T Communications of Virginia, LLC, would continue serving its existing UNE-P customers, but only by paying higher market-based wholesale rates. Under that agreement, AT&T's monthly per-line costs in the most densely-populated exchanges increased by **[BEGIN AT&T/VERIZON PROPRIETARY]**

[END AT&T/VERIZON PROPRIETARY] [10]

(5) The $2.00 price increase AT&T will implement on February 1, 2008, for Call Plan Unlimited Plus service will not cover the increase in costs AT&T has experienced since it announced in mid-2004 that it would no longer actively market the service. In addition to the upcoming February 1 increase, AT&T previously implemented a $2.00 increase effective March 1, 2007.[11] This aggregate $4.00 price increase is well short of the **[BEGIN AT&T/VERIZON PROPRIETARY]** **[END AT&T/VERIZON PROPRIETARY]** in increased costs AT&T has incurred for this service.

(6) The public interest will not be harmed by the granting of AT&T's Petition. Every customer affected by the proposed increase has other options available from carriers which, unlike AT&T, continue to aggressively market to wireline mass market customers. For one thing, because all of the affected AT&T customers are served using

---

[10] The market-based wholesale charges incorporated in the commercial agreement between Verizon and legacy AT&T are subject to specific non-disclosure requirements. AT&T has obtained Verizon's permission to disclose this proprietary information to the Commission and its Staff.

[11] On January 3, 2007, at Case No. PUC-2007-00001, AT&T filed a Petition seeking authority to exceed the Commission's price cap rules in order to increase the price of Call Plan Unlimited Plus to $16.82. That Petition was granted by Commission order dated March 21, 2007.

wholesale arrangements AT&T obtains from Verizon, 100% of AT&T's customers could switch to Verizon if they so elected. Verizon offers a broad range of packages and options, ranging, for example, from basic service at $16.37 per month (for the customers affected by this petition) to its Verizon Freedom Essentials plan which gives customers unlimited local and long distance calling across the U.S. Canada and Puerto Rico, plus voice mail, caller ID and call waiting, for $44.95 per month. Verizon, however, is not the only option available to Virginia consumers affected by this filing. AT&T's remaining residential local exchange customers are clustered in Virginia's major metropolitan areas where other carriers, including, but not limited to, CLECs, cable telephony providers and other VoIP providers also target their sales efforts.[12] Based on information in Cavalier's Tariff 1A, for example, it appears the company offers residential local exchange service everywhere that AT&T has customers. Cavalier's web site touts unlimited local calling, plus free long distance calling to other Cavalier local service customers, plus twelve features, plus 5¢ per minute long distance, all for $24.95 per month. Cavalier also offers unlimited local and long distance calling within the U.S. and Canada for $34.95 per month. Cox Communications, which serves Fairfax, Fredericksburg, Hampton Roads and Roanoke, offers similar pricing plans, and often offers enticements to its current cable TV subscribers to encourage them to sign up for telephone service. Comcast, which serves the Alexandria, Arlington and Richmond areas, claims great success for its Digital Voice service, having surpassed 3.5 million voice customers nationwide. Comcast offers its existing cable customers unlimited local and domestic long distance

[12] Nearly one-third of AT&T's residential local exchange customers are concentrated in Northern Virginia. Nearly one-fourth are in the Norfolk area, and another one-fourth are in the Richmond area. The remaining customers, for the most part, are concentrated in the Roanoke/Lynchburg area.

calling plus up to twelve features for $33 a month for the first twelve months ($39.95 thereafter), with free standard installation.[13] Wireless carriers are also an option. Several wireless carriers offer service to AT&T's Virginia residential customers, and studies show that an increasing number of consumers are electing to "cut the cord" to rely exclusively on wireless service for voice communications.[14] The plain fact is that any AT&T customer displeased by AT&T's price increase will have other options available, and will be free to explore them on their own schedule and under their own terms.

WHEREFORE, for the reasons set forth herein, AT&T Communications of Virginia, LLC, respectfully requests Commission approval to implement effective February 1, 2008, a $2.00 per line per month increase in the charges for AT&T Call Plan Unlimited Plus, resulting in a monthly rate of $18.82 for the primary line and $17.95 for additional lines.

---

[13] http://www.comcast.com/

[14] For example, a study by the Center for Disease Control looking at data for the first half of 2006 found that as many of 10 percent of households now rely exclusively on wireless phones (the trendlines in the study would suggest the percentages are markedly higher today). http://0-www.cdc.gov.mill1.sjlibrary.org/nchs/products/pubs/pubd/hestats/wireless2006/wireless2006.htm The CTIA, the wireless industry trade organization, estimates that at year end 2006 nearly 13% of households were wireless only. http://www.ctia.org/content/index.cfm/AID/10323 CTIA also observes that "As the current teenagers (13 to 18) mature — graduate from college and establish independent households — they will be even more likely than their predecessors to remain wireless-only. For many of these consumers, the wireless phone is, and most likely will be, their primary phone." http://www.ctia.org/news_media/index.cfm/AID/10254

Respectfully submitted,

AT&T Communications of Virginia, LLC,

By its attorney,

Mark A. Keffer Virginia Bar No. 27355
3033 Chain Bridge Road
Room D-C3.201
Oakton, Virginia 22185
703 691-6046
mkeffer@att.com

October 12, 2007